JALEX SDN BHD v. CITY PROPERTIES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN JC
[SUIT NO: WA-22NCC-247-06-2017]
6 MARCH 2020

CIVIL PROCEDURE: *Discovery – Documents – Order for production to court – Application for – Whether documents sought relevant to issues in dispute – Whether there was necessity for its production – Whether fishing expedition – Whether there was inordinate delay in filing application – Whether requirements of O. 24 rr. 12 and 13(1) of Rules of Court 2012 fulfilled – Whether just and equitable to allow application*

This was the plaintiff's application ('encl. 51') pursuant to O. 24 r. 12 and O. 24 r. 16 of the Rules of Court 2012 ('ROC') and/or the inherent jurisdiction of the court for the following orders, *inter alia*, that the defendants produce to the court the documents or classes of documents that were within their possession, custody or control. In resisting the application, in essence, the defendants maintained that (i) the documents sought were irrelevant to the factual issues in dispute and there was no necessity for its production; (ii) the application was a fishing expedition by the plaintiff; and (iii) there was inordinate delay on the plaintiff's part in filing this application. The plaintiff, on the other hand, submitted that the discovery being sought was necessary and relevant for the purposes of fairly disposing of the matter and saving costs. It was contended further there was no delay in filing this application.

Held (allowing application):

(1) The relevant documents or classes of documents were described in several clauses of a Supplemental Agreement II dated 16 January 2013 executed between the first defendant and United Overseas Bank (Malaysia) Bhd. A loan facility was obtained by the first defendant to complete a project to which the plaintiff was a contractor. The documents were not unrelated to the dispute, having been referred to in the said supplemental agreement. From the plaintiff's description of the documents sought, it was clear that the documents were specific and the tabular explanation provided by the plaintiff instructive. It contained the documents required and the justification why it was sought for. The production of the identified documents was necessary for the fair disposal of the matter. The required documents related directly to the case of the plaintiff. The documents such as guarantees to UOB and the relevant architect certificates would be necessary for the plaintiff to prove its case. (paras 2, 15-17)

(2) This case was originally filed in 2017 and had gone through 17 case managements prior to the case against the first defendant being struck out by the court in January 2018. The case against the second and third defendant was stayed pending the plaintiff's appeal against the striking-out decision. The plaintiff succeeded at the Court of Appeal and the case was remitted back to the High Court in July 2017. The first defendant applied for leave to appeal at the Federal Court. The said matter came up for case management before this court in August 2019 during which pre-trial directions were given and trial dates were set. The leave application to the Federal Court did not progress further as the said leave application was withdrawn in September 2019 by the first defendant. It was on the third case management before this court that the plaintiff filed encl. 51. Based on the chronology, this court did not find the issue of timing or delay a factor that could deny the application. It was thus applied within a reasonable time frame. (para 18)

(3) This application was not made to comb through the documents within the possession of the defendants. It was not a fishing expedition. The documents were specific and showed direct links to the said supplemental agreement. The plaintiff had satisfactorily demonstrated that the identified documents would be relied upon during the trial. The documents could adversely affect the defendants' case or support the plaintiff's case. Therefore, the requirements of O. 24 r. 12 of the ROC had been met and the requirement of necessity as required under O. 24 r. 13(1) of the ROC had been fulfilled. Ordering the discovery of the said documents would not in any manner be prejudicial to the defendants. It would instead be just and equitable to allow the application. (paras 20 & 27)

Case(s) referred to:

Jalex Sdn Bhd v. City Properties Sdn Bhd & Ors [2018] 1 LNS 667 HC ***(refd)***

Kingtime International Ltd & Anor v. Petrofac E & C Sdn Bhd [2020] 1 CLJ 862 HC ***(refd)***

Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40 CA ***(refd)***

Yekambaram Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:

Companies Act 2016, s. 540

Rules of Court 2012, O. 24 rr. 12, 13(1), 16

For the plaintiff - P Gananathan & Iris Tan Li Chie; M/s Gananathan Loh

For the 1st defendant - Ben Chan Chong Choon & Low Hai Liang; M/s Ben Chan

For 2nd & 3rd defendants - Harvinderjit Singh, R Vasanthi, Sara Ann Chay Sue May; M/s Vin Law Co

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Fairuz Zainol Abidin JC:

Introduction

[1] This is the plaintiff's application pursuant to O. 24 r. 12 and O. 24 r. 16 of the Rules of Court 2012 and/or the inherent jurisdiction of the court for the following orders, *inter alia*:

(i) that the defendants within seven days from the date of the service of the order herein produce to the court the documents or classes of documents that are within their possession, custody or control as specified or described in annexure A herein;

(ii) that the defendants do affirm and file an affidavit within seven days from the date of service of the order herein for the purpose of production of the documents or classes of documents under prayer (i) hereinabove and serve a copy of the affidavit to the solicitors of the plaintiff;

(iii) if the first defendant fails to comply with prayers (i) and (ii) above, that the first defendant's defence dated 5 September 2017 be struck out and judgment be entered accordingly; and

(iv) if the second and third defendants fail to comply with prayers (i) and (ii) above, that the second and third defendants' defence dated 5 September 2017 be struck out and judgment be entered accordingly.

Annexure A

Documents And/Or Classes Of Documents

[2] The following documents or classes of documents described in the following clauses of the Supplemental Agreement II dated 16 January 2013 executed between the first defendant and United Overseas Bank (Malaysia) Bhd attached to the annexure herein as Schedule 1:

1.1 under cl. 1.1:

(a) "JS guarantee", ie, joint and several guarantee executed by the guarantors in favour of United Overseas Bank (Malaysia) Bhd pursuant to cl. 3.6.2;

(b) "Letter of offer", ie, letters dated 21 September 2012 and 7.11.2012 and any other supplemental letters of offer issued by United Overseas Bank (Malaysia) Bhd from time to time;

(c) "LOU-Costs", ie, letters executed by the first defendant, guarantors and the shareholders of the first defendant in favour of the United Overseas Bank (Malaysia) Bhd whereby the first defendant, the guarantors and the shareholders of the first defendant undertake to cover any Retrofit/Upgrade cost overrun and to complete the Retrofit/Upgrade and Fit-Out;

A (d) "LOU-Disposal", ie, letters executed by the shareholders of the first defendant in favour of the United Overseas Bank (Malaysia) Bhd pursuant to cl. 3.6.3 whereby the shareholders of the first defendant undertake not to dispose of their shares in the first defendant without United Overseas Bank (Malaysia) Bhd's prior written approval;

B 1.2 under cl. 4.2.1:

(a) the architect's written confirmation accompanied with each and every request for drawdown on term loan three facility that:

(i) there is no cost overrun above the total retrofit/upgrade C costs; and

(ii) there is no delay in the retrofit/upgrade completion date of 31 March 2013.

1.3 under cl. 4.6:

D (a) all notices of drawdown issued by the first defendant and submitted to United Overseas Bank (Malaysia) Bhd for the entire term loan three facility;

(b) all progressive billing or invoice issued by the Podium supervising architect's Certification for Retrofit/Upgrade costs incurred in respect of work completed and/or other E documentary evidence of expenditure incurred and submitted to United Overseas Bank (Malaysia) Bhd for the entire term loan three facility;

(c) all notices of drawdown issued by the first defendant and submitted to United Overseas Bank (Malaysia) Bhd for the F entire term loan three facility;

(d) all progressive billing or invoice issued by the Podium supervising architect's certification for the fit-out costs incurred in respect of work completed and/or other documentary evidence of expenditure incurred and submitted to United G Overseas Bank (Malaysia) Bhd for the entire term loan four facility

[3] Proof of payments eg, cashier's orders, bank drafts, cheques, bank transmission slips, negotiable instruments or the equivalent demonstrating payments to all contractors and consultants from the loan account disbursed H under the term loan three and term loan four facilities under the Supplemental Agreement II dated 16 January 2013.

[4] The trial of this suit was initially fixed for six days from 2 to 4 March 2020 and 13 to 15 April 2020. This application was filed on 17 January 2020.

I **[5]** At the conclusion of the hearing, this court allowed the application. The following are the grounds of judgment of this court.

Background Facts Of The Case

Parties

[6] The plaintiff is the contractor appointed to carry out architectural and interior design works for a retail podium and commercial development known as Avenue K. It is also a creditor of KL Landmark Development Sdn Bhd ("KL Landmark"). The first defendant is and was at all material time owner and developer of Avenue K. The second and third defendants were the Directors of KL Landmark. The second defendant was and is also the director of the first defendant.

[7] Mohamed Zaini Mazlan has previously on 17 January 2018 decided on the striking out application filed by the first defendant which has been appealed against. That case is reported as *Jalex Sdn Bhd v. City Properties Sdn Bhd & Ors* [2018] 1 LNS 667. For the purpose of consistency, this court will reproduce the brief facts of the case as found in that judgment.

Brief facts

> [3] The wholly owned subsidiary of the First Defendant in question is KL Landmark Development Sdn Bhd ("KL Landmark"). It had appointed the Plaintiff as a contractor, and was entrusted to carry out architectural and interior design works for the shopping complex known as 'Avenue K', which is situated across Jalan Ampang, opposite the iconic Petronas Twin Towers.
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> [4] The Plaintiff's appointment was done through two (2) letters of award. The Plaintiff claimed to have also done additional works through several variation orders and additional works. The Plaintiff completed its part of the bargain and expected to be paid. Its expectations however were not met.
>
> [5] This led the Plaintiff to commence two (2) adjudication proceedings against KL Landmark pursuant to the Construction Industry Payment and Adjudication Act 2012. The Plaintiff succeeded in both adjudication proceedings. The debts however remain unpaid.
>
> [6] The Plaintiff then commenced winding-up proceedings against KL Landmark, which resulted in a winding-up order against the latter in September 2016. Much to the Plaintiff's dismay, it was notified by the Official Receiver that KL Landmark had only RM3,000.00 in its estate balance, which incidentally was the deposit that the Plaintiff had paid to the Insolvency Department when it commenced the winding-up proceedings. As at the date of the winding-up order, the Plaintiff was out of pocket to the tune of RM9,252,342.52. This was the total amount owing by KL Landmark, inclusive of the adjudication proceedings costs.

A [7] The Plaintiff's claim against the First Defendant was premised on the fact that the latter is the owner and developer of the Avenue K, and that the work done was for its benefit. The Plaintiff claimed that the First Defendant had merely used KL Landmark, being its wholly owned subsidiary, as a vehicle to enter into contracts with companies engaged to carry out works at Avenue K.

B [8] In essence, the Plaintiff alleged that the First Defendant was the alter ego of KL Landmark. The business of KL Landmark, the Plaintiff claimed, was carried out under the direction and control of the First Defendant. The Plaintiff adamantly claimed that the First Defendant had carried on business with an intention to defraud C creditors, such as the Plaintiff, through KL Landmark.

[9] The Plaintiff also claimed that the First Defendant had in 2013, obtained a RM47 million loan from the United Overseas Bank (Malaysia) Berhad, premised on a fixed and floating charge over KL Landmark's rights, benefits and entitlements on all its contracts. D Although the charge was eventually discharged, KL Landmark's debts to the Plaintiff remained unpaid.

[10] Through this suit, the Plaintiff sought for amongst others, a declaration under section 540 of the Companies Act 2016, that the First Defendant had carried on business through KL Landmark to defraud the Plaintiff, and in consequence, for all the Defendants to E pay the Plaintiff the sum of RM9,252,342.52 with interests.

The Present Application

[8] On 9 January 2020, the plaintiff's solicitor wrote to the defendants' respective solicitors requesting for the abovementioned documents. F Thereafter, on 17 January 2020, this application as documented in encl. 51 was filed by the plaintiff to order the defendants to produce the said documents to the court to which the defendants resisted.

Parties' Contention

G **[9]** In resisting the application, in essence, the defendants maintained that:

(i) the documents sought are irrelevant to the factual issues in dispute and there is no necessity for its production;

(ii) the application is a fishing expedition by the plaintiff; and

H (iii) there is inordinate delay on the plaintiff's part in filing this application.

[10] The plaintiff on the other hand submitted that the discovery being sought is necessary and relevant for the purposes of fairly disposing of the matter and saving costs. It was contended further that there was no delay in filing this application.

I **[11]** The arguments proffered by the parties will be examined below.

Analysis And Findings Of This Court

[12] The relevant provision concerning production to court is found in O. 24 r. 12 of the Rules of Court 2012 which states:

> Order for production to Court (O. 24 r. 12)
>
> 12(1) At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter that falls within one of the following descriptions:
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> (a) documents on which the party relies or will rely;
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> (b) documents which could:
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> (i) adversely affect a party's case; or
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> (ii) support a party's case; and
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> (c) documents which may lead to a series of inquiry resulting in the obtaining of information which may:
>
> (i) adversely affect a party's case; or
>
> (ii) support a party's case.
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> (2) The Court may deal with the documents when produced in pursuance of an order made under paragraph (1) in such manner as it thinks fit.

Relevancy And Necessity

[13] Order 24 r. 12 is to be read in the light of r. 13(1) of the same order, which states:

> Production to be ordered only if necessary (O. 24, r. 13)
>
> 13(1) An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

[14] In *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40, the Court of Appeal emphasised the test of necessity provided under r. 13(1) where it held:

> As stated earlier the real issue is compliance with r. 13(1) which stipulates that discovery may only be ordered if the court is of opinion that such order is necessary either for disposing fairly of the cause or matter or for saving costs. The test is necessity not fairness and it is for the applicant to satisfy the court, …

[15] From the facts, it was not disputed that the loan facility was obtained by the first defendant to complete the project to which the plaintiff was a contractor. The defendants contended that the documents were third party documents. It was thus irrelevant to the case. It is the finding of this court that the documents were not unrelated to the dispute, having being referred in the Supplemental Agreement II. Be that as it may, the position of law where the materiality of discovery is concerned, the facts pleaded by the party seeking discovery must be assumed to be true. In *Yekambaram Marimuthu v. Malayawata Steel Bhd* [1994] 2 CLJ 581, Edgar Joseph Jr SCJ held:

> The observation of Edward Bray in his highly regarded work on discovery at p. 18 as to the test of "materiality" merits quotation; there he says this:
>
> > ... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.
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> I note that proposition received judicial approval in *Format Communications Mfg. Ltd. v. ITT (UK) Ltd.* [1983] FSR 473 CA.

[16] From the plaintiff's description of the documents sought, it is clear to this court that the documents were specific. This court finds the tabular explanation provided by the plaintiff instructive. It contains the documents required and the justification why it is sought for. The table is reproduced below.

Annexure A	Documents	Relevance/Necessity
1.1 (a)	The "JS Guarantee" (clauses 1.1 and 3.6.2 of Supplemental Agreement II)	Supplemental Agreement II reveals that JS Guarantee was a security for the loan. The Guarantors identified under the Supplemental Agreement II were the 2nd Defendant and his father (page 26 of Encl. 51) It would be relevant and necessary to show that the business of KL Landmark was carried out under the directions and control of the Defendants and that the release of the charge with the knowledge and approval of the Defendants. **(See : Statement of Claim (Encl. 2), para 22 and 26)**

Annexure A	Documents	Relevance/Necessity
1.1 (b)	The "Letter of Offer" (clause 1.1, 4.1.3 and 4.1.5 of Supplemental Agreement II)	It is apparent that the Supplemental Agreement II was a further facility to the original facility between the 1st Defendant and UOB Bank. It is apparent that payments were made before Supplemental Agreement II was entered into **(see: Plaintiff's Affidavit in Reply, Encl. 57, para 6).** It would be relevant and necessary to understand the overall facility granted to the 1st Defendant from UOB Bank which then led to the Supplemental Agreement entered into.
1.1 (c) and (d)	The "LOU-Cost"/" LOU-Disposal" (clauses 3.6 and 3.6.3 of Supplemental Agreement II)	The 1st Defendant/guarantors/ shareholders of the 1st Defendant were to provide letters of undertaking to cover any retrofit/upgrade costs overrun and to complete the retrofit/upgrade. The LOUs were securities to be furnished. The Defendants contend that all contractors and consultants were paid. Yet, the Plaintiff was not paid. The Defendants were under an obligation to ensure that the Project costs did not exceed the loan facility or that KL Landmark did not incur debts which it could not repay. It will lead to a train of inquiry as to why the charge was released when the Plaintiff had not been paid (see : Plaintiff's Affidavit, Encl. 52, para 20).

Annexure A	Documents	Relevance/Necessity
		It would be relevant and necessary to test the Defendants' plea and to also clearly identify as to whether such LOUs were given or waived and whether they were breached. (See: the 1st Defendant's Defence, Encl. 8, para 15) (See also : the 2nd and 3rd Defendants' Defence, Encl. 6, para 20)
1.2, 1.3 and 2	The Architect's written confirmation for drawdown/notices of drawdown/progressive billing and invoices/ proof of payment (clauses 4.2.1 and 4.6 of Supplemental Agreement II)	**These documents were conditions precedent to the drawdown of the loan.** The Defendants contend that all contractors/ consultants were paid. To date, there are **no documents produced** by the Defendants to support their contention that the full RM47,000,000 under the facility was used to pay all contractors/ consultants. **(See: the 1st Defendant's Defence, Encl. 8, para 15)** **(See also: the 2nd and 3rd Defendants' Defence, Encl. 6, para 20)** These documents would be relevant and necessary to either support the Plaintiff's case or adversely affect the Defendant's case.

[17] The application for production of documents under O. 24 r. 12 must also pass the test of the documents being necessary as required under O. 24 r. 13(1). This court is of the view that production of the identified documents was necessary for the fair disposal of the matter. The required documents relate directly to the case of the plaintiff. The documents such as guarantees to UOB and the relevant architect certificates will be necessary for the plaintiff to prove its case. It is also necessary to the defendant to refute the contention of the plaintiff to bolster its defence.

Delay

[18] It is not disputed that this case was originally filed in 2017. It had gone through 17 case managements prior to the case against the first defendant being struck out by the court in January 2018. The case against the second and third defendants was stayed pending the plaintiff's appeal against the striking-out decision. The plaintiff succeeded at the Court of Appeal and the case was remitted back to the High Court in July 2017. The first defendant applied for leave to appeal at the Federal Court. The said matter came up for case management before this court in August 2019 during which pre-trial directions were given and trial dates were set, with the first tranche to begin from 2 March 2020 to 4 March 2020. The leave application to the Federal Court did not progress further as the said leave application was withdrawn in September 2019 by the first defendant. It was on the third case management before this court that the plaintiff filed encl. 51. Based on the chronology, this court does not find the issue of timing or delay a factor that could deny the application. It was applied within a reasonable timeframe.

[19] The second and third defendants on the other hand, argued that the application was made too late in the day. It was argued at length by the second and third defendants that this was purely an exercise to prop up the case of the plaintiff. It was argued that the plaintiff only realised that the documents sought were crucial to the plaintiff while preparing the witness statements for trial. This court is of the view that such arguments, were not sufficient to deny the plaintiff's application. The test to be applied is whether it fulfils the requirements found in O. 24 r. 12 and O. 24 r. 13.

Fishing Expedition

[20] This court does not find the application to be one that was made to comb through the documents within the possession of the defendants. It was not a fishing expedition as suggested during arguments. Conversely, as stated above, the documents were specific and showed direct links to the said Settlement Agreement II.

Exercise Of Discretion

[21] The power to allow discovery is not an exercise of the court's inherent jurisdiction. It is specifically allowed under the Rules of Court 2012. The word "may" as can be found under O. 24 r. 12 connotes an exercise of discretion. In *Kingtime International Ltd & Anor v. Petrofac E & C Sdn Bhd* [2020] 1 CLJ 862; [2019] MLJU 731 Wong Kian Kheong J held as follows:

> The court has a discretion under O. 24 rr. 3 and/or 7 RC to order discovery of documents. This is clear from the use of the permissive term "may" in O. 24 rr. 3 and 7 RC. The Court's exercise of discretion to order discovery of documents pursuant to O. 24 rr. 3 and 7 RC, depends on the particular circumstances of each case. As such, cases on O. 24 rr. 3 and 7 RC are not binding legal precedents from the view point of the *stare decisis* doctrine.

[22] Given the similar words are found in O. 24 r. 12, it is ultimately an exercise of the discretion of this court based upon the particular circumstances of the case. In so exercising the discretion, this court took into consideration the following factors.

[23] Firstly, in cases where the case is one that involves fraudulent trading under s. 540 of the Companies Act 2016, documentation will provide valuable guidance to the court in determining the case. It can adversely affect or support either party's case.

[24] Secondly, the documents would lead to a series of enquiry resulting in the obtaining of information which may adversely affect or support the case of the plaintiff or defendants. This is especially so when references are made to other documents in the case such as the Supplementary Agreement II.

[25] Thirdly, the documents are necessary for the fair disposal of the matter. The duty of a trial court is to allow parties to have the fullest extent possible of all evidence including references to all documentary evidence necessary to prove or disprove a case, subject to the relevant parties proving the need to do so. If it is within the contemplation of the court that the documents are necessary for fair disposal of the matter, it would have to allow the discovery of the documents.

[26] Fourthly, the wordings employed in O. 24 r. 12 allow a court to make the order for discovery at any stage of the proceedings. From the sequence of the case management, the application was made before the trial began. It was applied some six weeks prior to the trial.

Conclusion

[27] In the assessment of this court, the plaintiff had satisfactorily demonstrated to this court that the identified documents will be relied upon during the trial. It was also shown to this court that the documents could adversely affect the defendants' case or support the plaintiff's case. Therefore, the requirements of O. 24 r. 12 have been met. Likewise, the plaintiff has demonstrated to this court requirement of necessity as required under O. 24 r. 13(1) has been fulfilled. This court is of the view that ordering the discovery of the said documents would not in any manner be prejudicial to the defendants. It would instead be just and equitable to allow the application. Enclosure 51 is therefore allowed.